Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-384

STEVEN A. TATERKA,

Petitioner,

v.

WISCONSIN TELEPHONE COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Steven A. Taterka

P.O. Box 971
Milwaukee, Wi. 53201

September 9, 1977

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PETITION FOR WRIT OF CERTIORARI TO THE
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FOR THE SEVENTH CIRCUIT

Petitioner, Steven A. Taterka, prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on May 4, 1977 (rehearing denied June 14, 1977).

OPINIONS AND ORDERS BELOW

United States District Court for the Eastern District of Wisconsin

May 1, 1975, Decision and Order dismissing plaintiff's original complaint, 394 F.Supp. 862 (App. 21a-23a).

March 5, 1976, Decision and Order dismissing plaintiff's amended complaint, not reported (App. 18a-20a).

June 29, 1976, Order denying plaintiff's motion to vacate judgment (thereby not allowing filing of proposed second amended complaint), not reported (App. 24a).

United States Court of Appeals for the Seventh Circuit

May 4, 1977, Order affirming District Court dismissal of amended complaint and denial of motion to vacate judgment, not reported* (App. 10a-16a).

June 14, 1977, Order denying plaintiff's petition for rehearing, not reported (App. 17a).

*The Court of Appeals ordered that its six page per curiam opinion in this case be unpublished (unreported) per Seventh Circuit Rule 35. Petitioner subsequently moved for its publication; the motion was denied.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on May 4, 1977. A timely petition for rehearing was denied on June 14, 1977. This petition for certiorari was filed within 90 days of that date.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I

Is dismissal of a complaint for failure to state a claim proper where the complaint alleges a conspiracy in restraint of trade and monopolization of commerce in violation of sections 1 and 2 of the Sherman Antitrust Act arising from a "no-switching" agreement among employers whereby such employers refuse to hire employees of one another while such employees are still employed or for a period of six months thereafter and the employers dominate the industry involved?

II

Does an employee denied employment as a result of such a no-switching agreement have standing to bring suit for lost wages under section 4 of the Clayton Antitrust Act?

III

Is it an abuse of discretion for a district court to deny a plaintiff's timely motion to vacate judgment (pursuant to Rule 59(e), Fed. R.Civ.P.) where the granting of such motion would permit the filing of a proposed second amended complaint and no prejudice to the defendant would result?

STATUTORY PROVISIONS INVOLVED

Sherman Act, § 1 (15 U.S.C. § 1)

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . [Resale price maintenance is omitted]. . . Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Sherman Act, § 2 (15 U.S.C. § 2)

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished

by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Clayton Act, § 4 (15 U.S.C. § 15)

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE

The subject of this litigation is an alleged "no-switching" agreement by which Bell System telephone companies, including the respondent, do not hire persons employed by other Bell System companies while they are still employed by such other Bell System companies or for a period of six months afterwards. In this suit petitioner seeks that the no-switching agreement be declared in violation of the antitrust laws and that he recover lost wages incurred as a result of respondent's adherence to that agreement. It is petitioner's position that the anti-competitive effects of the no-switching agreement, as alleged in the second amended complaint (App. 1a-8a), render adherence to it by the respondent and other Bell System companies in violation of sections 1 and 2 of the Sherman Antitrust Act and that petitioner has standing to bring suit under section 4 of the Clayton Antitrust Act.

Basis for Federal Jurisdiction

The jurisdiction of the District Court was invoked pursuant to 28 U.S.C. § 1337.

Facts

From November, 1970, until October, 1972, when he resigned, the petitioner (plaintiff) was employed as a switchman with the New York Telephone Company, a Bell System company. As a switchman plaintiff's duties included the maintenance and repair of telephone company switching equipment.

The respondent (defendant) telephone company is engaged in the business of providing communications to points within Wisconsin and, in interstate commerce, to points outside the state of Wisconsin. In conducting its operations the defendant operates telephone central offices and related transmission facilities through which approximately seventy-two percent of the telephones in the state of Wisconsin are operated, the remainder being operated by non-Bell operating companies generally referred to as "independents". The defendant is also engaged in supplying and servicing telephone equipment located on customers' premises in competition with various "interconnect" companies.

At all times material to this action, the defendant, a Bell System company, participated in a "no-switching" agreement with other companies of the Bell System. Under the no-switching agreement Bell System companies would not hire persons employed by other Bell System companies while still employed by such other Bell System companies or for a period of six months afterwards. Although there did exist a procedure by which Bell System employees might transfer from one Bell System company to another, such

procedure was subject to approval of both the Bell System company an employee wished to transfer to and the Bell System company he wished to transfer from. Refusal by a current Bell System employer to grant approval precluded the possibility of a transfer. A Bell System employee who resigned his employment was unable to secure employment with any Bell System company for a period of six months following such resignation.

In July, 1971, plaintiff, while still employed by New York Telephone but unable to work because of a strike then being waged against that company, sought employment with the defendant. Because of the no-switching agreement, he was not permitted to fill out an application for employment. In October, 1972, plaintiff resigned his employment with New York Telephone and on December 1, 1972, again sought employment with the defendant. At no time has the defendant offered plaintiff any type of employment.

Lower Court Proceedings

The original complaint in this suit contained two causes of action. The first cause of action involved a claim under Title VII of the Civil Rights Act of 1964, as amended, (42 U.S.C. § 2000e et seq.). The second cause of action set forth the plaintiff's antitrust claim arising from defendant's adherence to the alleged no-switching agreement.

The defendant moved to dismiss both causes of action pursuant to Rules 12(b)(1) & (6), Fed.R.Civ.P., on the grounds that the court lacked jurisdiction over the subject matter and that the plaintiff failed to state claims upon which relief could be granted. In a decision and order dated May 1, 1975, the

District Court, Honorable Myron L. Gordon presiding, granted defendant's motion to dismiss both causes of action. Taterka v. Wisconsin Telephone Co., 394 F.Supp. 862 (E.D. Wis. 1975) (App. 21a-23a).

Subsequently the plaintiff filed an amended complaint alleging both the Title VII and antitrust claims. The defendant again moved to dismiss pursuant to Rules 12(b)(1) & (6), Fed.R.Civ.P. In a decision and order dated March 5, 1976, the District Court granted defendant's motion to dismiss and ordered that this action be dismissed (App. 18a-20a).

The plaintiff then timely filed a motion to vacate judgment pursuant to Rule 59(e), Fed.R.Civ.P., in order that leave to amend be granted pursuant to Rule 15(a), Fed.R.Civ. P. The plaintiff sought that the March 5, 1976, judgment be vacated with respect to the second cause of action (antitrust claim) only. With the brief in support of the motion the plaintiff submitted a copy of his proposed second amended complaint (App. 1a-8a). On June 29, 1976, the District Court denied the plaintiff's motion to vacate judgment (App. 24a).

A notice of appeal was filed by the plaintiff on July 29, 1976. The notice of appeal specified that appeal was being taken from the final judgment dismissing plaintiff's second cause of action (antitrust claim) entered on March 5, 1976, and the denial of plaintiff's motion to vacate judgment entered on June 29, 1976.

On May 4, 1977, the Seventh Circuit Court of Appeals affirmed the District Court's dismissal of the amended complaint and its denial of the plaintiff's motion to vacate judgment. In a six page per curiam decision (App. 10a-16a) the Court held that no Sherman

Act violation was stated in the amended complaint and that there was no abuse of discretion in denying the plaintiff's motion to vacate judgment which would have permitted the filing of the proposed second amended complaint.

The Seventh Circuit's reasoning on the denial of the motion to vacate was twofold; first, said the Court, the plaintiff had amended his complaint once; and second, filing of the proposed second amended complaint would have been futile since, in the Court's opinion, it failed to state a claim. It is these issues, whether the proposed second amended complaint states a claim upon which relief can be granted (question presented no. I), and whether judgment should have been vacated to allow its filing (question presented no. III), which petitioner seeks to have reviewed in this Court.

REASONS FOR GRANTING THE WRIT

The decision of the Seventh Circuit Court of Appeals in the instant case that the plaintiff's second amended complaint fails to state a claim upon which relief can be granted directly conflicts with this Court's decisions in Radovich v. National Football League, 352 U.S. 445 (1957) and Anderson v. Shipowners' Association of Pacific Coast, 272 U.S. 359 (1926), and the decision of the Second Circuit Court of Appeals in Union Circulation Co. v. Federal Trade Commission, 241 F.2d 652 (2nd Cir. 1957). All three cases involved blacklisting of employees which was found to be actionable under the Sherman Act.

I

UNDER RADOVICH V. NATIONAL FOOTBALL LEAGUE A COMPLAINT ALLEGING A CONSPIRACY BETWEEN NON-COMPETITORS STATES A SHERMAN ACT VIOLATION WHERE IT ALLEGES DAMAGE TO THIRD PARTY COMPETITORS

In Radovich a plaintiff's complaint was held to state a claim under the Sherman Act where it alleged that plaintiff had been blacklisted pursuant to a blacklisting agreement among football league teams. Radovich had been a football player with a National Football League team and left to play for a team connected with the All-America Conference, a competing league. Subsequently a Pacific Coast League team offered to employ Radovich but then refused to do so after being advised by the National Football League that Radovich was being blacklisted. Radovich brought suit under section 4 of the Clayton Act (15 U.S.C. § 15) contending that the blacklisting agreement between the National Football League and the Pacific Coast League, which was intended to destroy the All-America Conference, constituted a conspiracy to monopolize and control organized football in the United States in violation of sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2). This Court reversed a lower court dismissal of the complaint holding that the blacklisting agreement involved was within the scope of the antitrust laws and that Radovich had standing to bring suit.

The Court of Appeals in the instant case indicated that it recognized that in Radovich the effect of the blacklisting agreement was anticompetitive even though the parties to the agreement were noncompetitors. Nevertheless the Court of Appeals considered the

reasoning of Radovich inapplicable here because, in the amended complaint, no third party competitors of Bell System companies were alleged to have been affected by the no-switching agreement. But under the Court's own interpretation of Radovich, the second amended complaint states a cause of action since it does allege damage to non-Bell operating companies and non-Bell interconnect companies which compete with the Bell System. Those allegations of damage to third party competitors which the Court found lacking in the amended complaint are contained in the second amended complaint. The blacklisting in the instant case, with its alleged detrimental effects on non-Bell operating companies and competing interconnect companies, is analagous to the blacklisting in Radovich which had a detrimental effect on the All-America Conference, a competing football league.

II

UNDER ANDERSON V. SHIPOWNERS' ASSOCIATION OF PACIFIC COAST THE COURT OF APPEALS SHOULD HAVE CONSIDERED THE EXTENT TO WHICH THE NO-SWITCHING AGREEMENT CONSTITUTES A RESTRAINT UPON THE ABILITY OF BELL SYSTEM OPERATING COMPANIES TO ENGAGE IN INTERSTATE COMMERCE

In an early case, Anderson v. Shipowners' Association of Pacific Coast, 272 U.S. 359 (1926), this Court considered the validity of an agreement between members of a shipowners' association which required seamen to register with the association in order to obtain employment. Refusal of the association to register a seaman precluded his employment with a member shipowner. This Court held that the shipowners, by entering into such a combination, had subjected themselves to the control of the association.

As this Court put it, they had

> "....put themselves into a situation of restraint upon their freedom to carry on interstate and foreign commerce...." 272 U.S. at 365.

In the case at bar the Court of Appeals did not consider the extent to which the no-switching agreement constitutes a restraint upon the ability of Bell System companies to engage in interstate commerce. Competition for employees, insofar as it effects a business' ability to function, is no different than competition for anything else necessary to turn out a product or service. The effect therefore, of the no-switching agreement upon Bell System companies to supply telephone service is the same as the effect of the agreement among shipowners in Anderson; in both cases employers voluntarily* engaged in conduct which constitutes a restraint upon their ability to operate in interstate commerce.

*It might not be accurate to state that Bell System companies have voluntarily adhered to the no-switching agreement without knowing the extent to which American Telephone & Telegraph Company, the parent company of the Bell System, may have imposed adherence to it.

III

THE COURT OF APPEALS HAS MADE A DETERMINATION, CONTRARY TO THAT REACHED BY THE SECOND CIRCUIT IN UNION CIRCULATION CO. V. FEDERAL TRADE COMMISSION, AS TO THE FACTUAL VALIDITY OF PLAINTIFF'S ANTICOMPETITIVE ALLEGATIONS AND THUS EXCEEDED THE SCOPE OF REVIEW IN DETERMINING WHETHER A COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM

The Second Circuit, in Union Circulation Co. v. Federal Trade Commission, 241 F.2d 652 (2nd Cir. 1957), considered the consequences of no-switching agreements as they affect labor markets and thus the ability of businesses to compete. In Union agencies engaged in the business of selling magazine subscriptions door-to-door had entered into no-switching agreements whereby none of the parties to the agreement would hire each other's solicitors for a period of one year after employment. In affirming the Federal Trade Commission's order enjoining the agencies from continued implementation of the no-switching agreements the Second Circuit expressed concern that such agreements would have a tendency to freeze the labor supply. The Court reasoned that, even though only signatory agencies were bound to the agreement, an employee of one would hesitate to work for a competing non-signatory agency since he knew that he would be out of work for a year if, for any reason, the latter venture did not work out. The result then, would be that the magazine selling industry would become static to the advantage of large, established agencies and to the disadvantage of infant organizations. 241 F.2d at 658.

The Court of Appeals here rejected similar reasoning. In dealing with plaintiff's allegations that Bell System adherence to the no-switching agreement created a reluctance among Bell employees to work for non-Bell operating companies and competing interconnect companies, and therefore that such non-Bell companies were placed at a competitive disadvantage, the Court concluded that such allegations were too speculative to support an antitrust claim. The Court reached this result stating that a Bell System employee contemplating going to a non-Bell company "does not appear" to face

a substantial risk of being out of work within six months and precluded from further Bell System employment. This conclusion, itself speculative, is a factual determination that does not take into account the extent to which Bell employees perceive the risk since that is enough to prevent changes in employment to non-Bell companies. The Court thus engaged in fact finding with respect to plaintiff's allegations of anticompetitiveness when the question was only whether or not the second amended complaint stated a claim upon which relief could be granted.

IV

IN DENYING THE PLAINTIFF'S MOTION TO VACATE JUDGMENT WHICH WOULD HAVE PERMITTED THE FILING OF THE PROPOSED SECOND AMENDED COMPLAINT THE COURT OF APPEALS HAS NOT FOLLOWED THIS COURT'S GUIDELINES SET FORTH IN FOMAN V. DAVIS

In affirming the denial of the plaintiff's motion to vacate judgment which would have permitted the filing of the proposed second amended complaint, the Court of Appeals departed from the guidelines set forth by this Court in Foman v. Davis, 371 U.S. 178 (1962). Foman stands for the proposition that a plaintiff is entitled to have his claim tested on the merits and thus, as Rule 15(a), Fed.R.Civ.P. provides, leave to amend should be freely given when it would be in the interests of justice.

In the case at bar the Court of Appeals refused to allow the filing of the proposed second amended complaint apparently on the sole ground, apart from its view that the proposed amendment failed to state a claim, that the plaintiff had amended once previously. The Court cited its own decision in Austin v. House of Vision, Inc., 385 F.2d

171 (7th Cir. 1967), for the proposition that a plaintiff should be afforded an opportunity to amend once yet in that case, also an antitrust action, the plaintiff was allowed to amend twice. In the case at bar the defendant would not have been prejudiced had the proposed amendment been allowed. By not allowing it, the Court of Appeals did not follow Foman's guidelines.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

Steven A. Taterka

Sept. 9, 1977

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

- -

STEVEN A. TATERKA,
Plaintiff,
v.
WISCONSIN TELEPHONE CO.,
Defendant.

SECOND AMENDED COMPLAINT

74-C-625

- -

The plaintiff, complaining of the defendant, alleges to the Court as follows:

1. This complaint is filed under Section 4 of the Clayton Antitrust Act (Title 15, United States Code, Section 15) to recover damages resulting from the violation by the defendant, as hereinafter alleged, of Section 1 of the Sherman Antitrust Act, as amended (Title 15, United States Code, Section 1), and of Section 2 of the Sherman Antitrust Act, as amended (Title 15, United States Code, Section 2). The jurisdiction of this Court is founded upon Title 28, United States Code, Section 1337.

2. At all times mentioned herein the plaintiff's occupation was that of a switchman in what is known in the telephone trade as the number 5 crossbar switching system. The plaintiff was employed in that capacity with the New York Telephone Company during the period November, 1970 to October, 1972, at which time he resigned. While employed during that period the plaintiff was trained for the position of number 5 crossbar switchman through a training course as required by New York Telephone.

3. The defendant is a corporation organized under the laws of the state of Wisconsin with its principal offices located at 722 North Broadway, Milwaukee, Wisconsin. At all times mentioned herein the defendant operated within the state of Wisconsin within the territorial jurisdiction of this Court.

4. The defendant is, and at all times mentioned herein was, engaged in the business of providing communications to points within the state of Wisconsin and, in interstate commerce, to points outside the state of Wisconsin through connection to facilities of the American Telephone and Telegraph Company.

5. In conducting its operations the defendant is engaged in:
(a) operating telephone central offices and related transmission facilities through which approximately seventy-two percent (72%) of the telephones in the state of Wisconsin are operated, the remainder being operated by non-Bell operating companies generally referred to as "independents"; and
(b) supplying and servicing telephone equipment located on customers' premises, an area in which the defendant is in competition with various "interconnect" companies.

6. At all times mentioned herein the defendant and the co-conspirators named in paragraph 9 have been engaged in:
(a) a combination and conspiracy to restrain interstate commerce in violation of Section 1 of the Sherman Antitrust Act;
(b) a combination and conspiracy to monopolize a substantial segment of interstate trade and commerce in violation of Section 2 of the Sherman Antitrust Act.
(c) an attempt to monopolize a substantial segment of interstate trade and

commerce in violation of Section 2 of the Sherman Antitrust Act; and

(d) a combination and conspiracy in restraint of trade and commerce in violation of Section 133.01 Wisconsin Statutes.

7. The acts of the defendant and named co-conspirators were done in furtherance of the separate offenses charged in the preceeding paragraph and were a part thereof and were done with the purpose of restraining trade and monopolizing commerce. It was the intent of the defendant and named co-conspirators, among other things:

(a) to retain and increase their dominant positions in the operation of telephone central offices and related transmission facilities in the respective states in which they are authorized to operate to the detriment of non-Bell operating companies; and

(b) to retain and increase their dominant positions in the supplying and servicing of telephone equipment located on customers' premises to the detriment of non-Bell interconnect companies.

8. In furtherance of the separate offenses charged in paragraph 6, the defendant, which is known as a Bell System Company, and the co-conspirators named in paragraph 9, also known as Bell System companies, gave force and effect to an agreement imposing restrictions on employment (hereinafter referred to as the no-switching agreement). Under the no-switching agreement Bell System companies would not hire persons employed by other Bell System companies while still employed by such other Bell System companies or for a period of six (6) months thereafter. While there did exist a procedure by which Bell System employees might transfer from one Bell System company to another, such procedure was subject to approval of both the

Bell System company an employee wished to transfer to and the Bell System company he wished to transfer from. A refusal by a current Bell System employer to grant approval precluded the possibility of a transfer. An employee of a Bell System company who did not, or for any reason could not, avail himself of the transfer procedure was unable to secure employment with another Bell System company within six (6) months of resigning Bell System employment due to adherence to the no-switching agreement by the defendant and named co-conspirators. The no-switching agreement was aimed at the plaintiff and others similarly situated and enabled the defendant and named co-conspirators, by virtue of their dominant positions in the telephone field, to exercise great control over the mobility of their employees.

9. Various corporations, not named as defendants herein, participated as co-conspirators with the defendant in the conspiracy charged herein. These corporations include the following:

American Telephone and Telegraph Company
New England Telephone and Telegraph Company
The Southern New England Telephone Company
New York Telephone Company
New Jersey Bell Telephone Company
The Bell Telephone Company of Pennsylvania
The Diamond State Telephone Company
The Chesapeake and Potomac Telephone Company
The Chesapeake and Potomac Telephone Company of Maryland
The Chesapeake and Potomac Telephone Company of Virginia
The Chesapeake and Potomac Telephone Company of West Virginia
Southern Bell Telephone and Telegraph Company
South Central Bell Telephone Company
The Ohio Bell Telephone Company

Cincinnati Bell
Michigan Bell Telephone Company
Indiana Bell Telephone Company
Illinois Bell Telephone Company
Northwestern Bell Telephone Company
Southwestern Bell Telephone Company
The Mountain States Telephone and Telegraph Company
Pacific Northwest Bell Telephone Company
The Pacific Telephone and Telegraph Company
Bell Telephone Company of Nevada
Western Electric Company

10. During the month of July, 1971 the plaintiff, while still in the employ of New York Telephone, attempted to obtain employment with the defendant as a switchman. The plaintiff, unable to work at that time due to a strike then being waged against New York Telephone, presented himself at the employment office of the defendant whereupon, pursuant to the no-switching agreement alleged in paragraph 8, defendant's employment representative refused to permit the plaintiff to fill out an application for employment.

11. On December 1, 1972 the plaintiff, after having resigned his employment with New York Telephone, again attempted to obtain employment with the defendant as a switchman. At that time the plaintiff was permitted to fill out an application for employment; however, such application was subject to the six (6) month waiting period required by the no-switching agreement.

12. Among the reasonably foreseeable effects of adherence to the no-switching agreement by the defendant and named co-conspirators have been:

(a) that the defendant and named co-conspirators have been unable to employ

persons formerly employed by Bell System companies within a six (6) month period, that the defendant and named co-conspirators have had to train inexperienced personnel for positions which otherwise could have been filled by such former Bell System personnel, and that as a consequence of such training defendant's operating costs have been increased along with resulting increase in prices to the detriment of the telephone using public;

(b) that knowledge of the no-switching agreement among Bell System personnel has created a reluctance among such personnel to seek employment with non-Bell operating companies because of the fear that if such non-Bell operating company employment does not work out such persons will be precluded from working for any Bell System company for a six (6) month period, that such a freezing of the telephone labor force has hindered non-Bell operating companies in obtaining qualified personnel to the detriment of such non-Bell operating companies, and that the possibility of failure of such non-Bell operating companies to remain in business has therefore increased raising the possibility of takeover of their operating areas by the defendant and named co-conspirators;

(c) that knowledge of the no-switching agreement among Bell System personnel has created a reluctance among such personnel to seek employment with various interconnect companies which are in competition with the defendant and named co-conspirators because of the fear that if such interconnect company employment does not work out such persons will be precluded from working for any Bell System company for a six (6) month period, and that such a freezing of the telephone labor force has hindered interconnect companies in obtaining qualified personnel to the detriment of such interconnect companies and to the advantage of

the defendant and named co-conspirators;

(d) that persons employed by Bell System companies have been unable to market their skills in a competitive manner among other companies of the Bell System and, as such, have been injured in their business and property within the meaning of Section 4 of the Clayton Antitrust Act (Title 15, United States Code, Section 15); and

(e) that persons formerly employed by Bell System companies have been unable to obtain employment with Bell System companies for a six (6) month period following their Bell System employment and, as such, have been injured in their business and property within the meaning of Section 4 of the Clayton Antitrust Act (Title 15, United States Code, Section 15).

13. As a direct result of the defendant's adherence to the no-switching agreement the plaintiff was precluded from employment with the defendant, the dominant telephone company in the state of Wisconsin, and was therefore effectively precluded from pursuing his occupation as a number 5 crossbar switchman in the state of Wisconsin:

(a) during the time in which he was still employed with New York Telephone;

(b) during the six (6) month period beginning October, 1972 when he resigned from New York Telephone; and

(c) during the time period which would have continued from the time periods stated in (a) & (b) above had the plaintiff not been barred from employment with the defendant during those periods.

The plaintiff has therefore been injured in his business and property within the meaning of Section 4 of the Clayton Antitrust Act (Title 15, United States Code, Section 15) by suffering loss of wages for the position of switchman with the defendant from July, 1971 to the present.

Wherefore, plaintiff prays:

That the herein alleged no-switching agreement between the defendant and named co-conspirators be adjudged and decreed to be in violation of Sections 1 and 2 of the Sherman Antitrust Act (Title 15, United States Code, Sections 1 and 2) and in violation of Section 133.01 Wisconsin Statutes.

That the amount of damages plaintiff has sustained by reason of the unlawful acts of the defendant be ascertained and assessed according to defendant company's wage scales for the position of switchman from July, 1971 to the present and the defendant be ordered to pay to the plaintiff three (3) times the amount of such damages as provided by Section 4 of the Clayton Antitrust Act (Title 15, United States Code, Section 15).

That the plaintiff recover such other amounts and have such other and further relief as the Court shall deem just.

/s/_____

Steven A. Taterka
Plaintiff pro se

177 Loudon Rd., E-7
Concord, New Hampshire 03301
603 224-5627

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

- -

STEVEN A. TATERKA,
Plaintiff,
v.
WISCONSIN TELEPHONE CO.,
Defendant.

MOTION TO VACATE JUDGMENT

74-C-625

- -

Plaintiff, Steven A. Taterka, moves the court pursuant to Rule 59(e) of the Federal Rules of Civil Procedure for an order vacating the judgment of this court entered March 5, 1976, dismissing plaintiff's amended complaint in the above-entitled action, and for leave to file a second amended complaint pursuant to Rule 15(a) of the Federal Rules of Civil Procedure.

This motion is made on the grounds set forth in the plaintiff's brief to be filed by March 26, 1976.

Dated: March 13, 1976.

/s/_____
Plaintiff pro se

Steven A. Taterka
177 Loudon Rd.,Bldg.E,#7
Concord, New Hampshire
03301
603 224-5627

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

- -

STEVEN A. TATERKA,
Plaintiff,
v.
WISCONSIN TELEPHONE CO.,
Defendant.

76-1888

- -

May 4, 1977

ORDER

Plaintiff appeals from an order of the district court dismissing the antitrust count of his amended complaint and from an order denying his motion to vacate judgment to permit the filing of a second amended complaint. We affirm both orders of the district court.

I

We turn first to the question of whether the district court properly dismissed the antitrust count of the amended complaint. The subject of plaintiff's antitrust claim was an alleged agreement among Bell System companies under which such companies would not hire persons employed by other Bell System companies on the open market while they were employed by the other companies or for six months thereafter. Instead, a procedure existed whereby a Bell System employee could transfer from one company to another if both the target company and the company from which the employee wished to transfer approved. Plaintiff named as parties to the agreement the defendant and certain other Bell System companies, titled according to

the separate geographical areas they apparently served. Plaintiff alleged that, as a result of the defendant's adherence to the agreement, it was required at times to train inexperienced personnel instead of employing those already trained and that the increased training costs were passed on to the public in the form of higher prices for telephone service. Plaintiff, a switchman for the New York Telephone Company from November, 1970, to October, 1972, alleged that he tried to obtain employment directly from the defendant Wisconsin Telephone Company in July, 1971, and in December, 1972, and was denied such employment because of the defendant's adherence to the transfer procedure agreement. Plaintiff alleged that the agreement violated section 1 of the Sherman Act, 15 U.S.C. § 1, and that he sustained damages recoverable under section 4 of the Clayton Act, 15 U.S.C. § 15, by the loss of wages resulting from defendant's refusal to hire him.

The alleged agreement by its nature restrains the freedom of the named Bell System companies to compete for each other's workers. However, in Nichols v. Spencer International Press, Inc., 371 F.2d 332, 335-36 (7th Cir. 1967), we stated that the antitrust laws "were not enacted for the purpose of preserving freedom in the labor market, nor of regulating employment practices as such . . . ." See 15 U.S.C. § 17. Plaintiff in this appeal disclaims any contention that the Sherman Act was enacted as a measure to protect labor. We must therefore look beyond the labor market to determine whether the agreement had any proscribed anticompetitive effects. In Nichols, we articulated a distinction between agreements among employers which do no more than restrict freedom to enter into employment relationships and those "among supposed competitors" which "impair

full and free competition in the supply of a service or commodity to the public." Nichols v. Spencer International Press, Inc., supra at 336. The latter constitute violations of the antitrust laws notwithstanding the fact that the impairment of business competition is effected by agreements restraining competition for labor. See id.; Anderson v. Shipowners Ass'n, 272 U.S. 359 (1926); Union Circulation Co. v. FTC, 241 F.2d 652 (2d Cir. 1957).

Plaintiff concedes that the companies party to the challenged agreement were not competitors in the delivery of telephone service to the public. He argues nevertheless that it is not the status of the parties as competitors, but the effect of the agreement on commerce, that determines whether the agreement violates the Sherman Act. While this assertion is in a broad sense true, an agreement among business interests does not violate the Sherman Act unless it impairs business competition. Standard Oil Co. v. United States, 221 U.S. 1 (1911). In Radovich v. National Football League, 352 U.S. 445 (1957), on which plaintiff relies, the defendant was required to face trial on an allegation that it had secured compliance with a blacklist of the plaintiff from the San Francisco Clippers, a member of the noncompeting Pacific Coast League. However, the blacklist was allegedly part of a conspiracy to boycott players of the All-America Conference, a competitor of the National Football League. Thus, the effect of the agreement between noncompetitors in Radovich was anticompetitive. The only effect on commerce cited in the amended complaint as resulting from the defendant's adherence to the agreement is an alleged increase in the price of the defendant's telephone service resulting from the increased cost of its training new personnel. In accordance with the principle just stated,

an increase in price does not signal illegality under the Sherman Act unless it can be traced to an agreement restraining business competition. Because the named parties to the alleged agreement were not business competitors, no such restraint could exist as among themselves. No third-party competitors of the Bell System companies are alleged to have been affected by the agreement in the amended complaint.

We therefore conclude that the district court was correct in its judgment that no violation of section 1 of the Sherman Act was stated by the amended complaint, and we affirm its order of dismissal.

II

We turn then to the question of whether the district court abused its discretion in denying plaintiff's motion to vacate judgment to permit the filing of a second amended complaint. We hold that the court's action was proper for two reasons: first, because the plaintiff had been given a prior opportunity to cure the defects in his complaint; and second, because filing of the second amended complaint would have been futile.

The district court dismissed the antitrust count of plaintiff's original complaint in part because it contained no factual allegations

> that competition /was/ impaired, that any trade or commerce /was/ affected, that any underlying anticompetitive agreement /was/ implemented by the alleged "no-switching" agreement, or that a contract was made or a conspiracy existed between competitors.

The court dismissed the plaintiff's amended complaint for the same reason, stating, "I

am unable to find in the amended complaint a cause of action alleging impact upon competition or a conspiracy between competitors."

Leave to amend a complaint must be freely given "when justice so requires." Fed. R. Civ. P. 15(a). In the absence of undue prejudice to the defendant by allowance of the amendment, the plaintiff must be afforded an opportunity to test his claim on the merits "/I/f the underlying facts or circumstances relied upon by /the/ plaintiff may be a proper subject of relief. . . ." Foman v. Davis, 371 U.S. 178, 182 (1962). If the plaintiff has failed once to state facts essential to the maintenance of his action, he must be afforded an opportunity to cure the defects by amendment. Austin v. House of Vision, Inc., 385 F.2d 171 (7th Cir. 1967). In the instant case, plaintiff failed not once but twice to allege facts indicating that the alleged agreement impaired competition. The defects in plaintiff's original complaint were stated with particularity by the district court in its decision and order of May 1, 1975. Plaintiff thereafter had an opportunity to cure the defects by submission of his amended complaint. After he failed to do so, justice did not require that he be allowed to try again. Although plaintiff is a pro se litigant, he admitted at oral argument that he is not indigent. We do not believe the district court was required to alter its judgment in light of plaintiff's lack of formal assistance.

Finally, in considering a motion to vacate judgment to allow the filing of an amended complaint, the district court may examine the proposed complaint to determine whether a filing would be futile. Foman v. Davis, supra at 182. Our examination of the second amended complaint persuades us that the defect con-

tained in the original and amended complaints was not cured by it. The heart of the second amended complaint is an allegation that non-Bell operating companies and certain "interconnect" companies in competition with the defendant were placed at a competitive disadvantage by the challenged agreement. In essence, plaintiff alleges that the agreement created a reluctance among Bell System employees to leave for work at non-Bell and interconnect companies for fear they would not be able to obtain work again at a Bell System company for the next six months. We believe this allegation is entirely too speculative to support an antitrust action.

The agreement as alleged did not interfere with the freedom of Bell System employees to leave or return to the company for which they worked. The only obstacle to their mobility was in transfer from one Bell System company to another, whether or not they took work elsewhere in the interval. In Union Circulation Co. v. FTC, 241 F.2d 652 (2d Cir. 1957), on which plaintiff heavily relies, an agreement among magazine subscription selling agencies not to hire salesmen employed by each other at any time during the preceding year was held to be anticompetitive, because it placed newly formed competing agencies at a disadvantage. Because of the apparently substantial chance that such agencies might not survive for a year, the court noted that salesmen who contemplated joining such agencies would naturally hesitate in the face of the risk that they could be out of work for a year if the new agencies should fail. Plaintiff does not allege that the existing non-Bell operating companies or interconnect companies faced a substantial chance of going out of business within six months at any given time or that any new companies might be formed with a similarly limited chance of survival. A Bell System employee

contemplating a move to a non-Bell operating company or an interconnect company does not appear to have faced a substantial, objective risk that he would be out of work within six months and precluded from further employment among Bell System companies as a result of the challenged agreement. Accordingly, the facts alleged in the second amended complaint do not support the plaintiff's theory that non-Bell operating companies and interconnect companies were placed at a competitive disadvantage by the agreement. The second amended complaint does not state a violation of the Sherman Act, and its filing would have been futile.

III

For the reasons stated above, the order dismissing the amended complaint and the order denying plaintiff's motion to vacate judgment are affirmed.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

- -

STEVEN A. TATERKA,
Plaintiff,
v. # 76-1888
WISCONSIN TELEPHONE CO.,
Defendant.

- -

June 14, 1977

On consideration of the petition for rehearing and suggestion for rehearing in banc filed in the above-entitled cause by the plaintiff-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

- -

STEVEN A. TATERKA,
Plaintiff,
v. # 74-C-625
WISCONSIN TELEPHONE CO.,
Defendant.

- -

DECISION and ORDER

In a decision and order dated May 1, 1975, this court ordered dismissal of the plaintiff's complaint, without prejudice. The plaintiff subsequently filed an amended complaint and, once again, the defendant has moved to dismiss. Briefs have been submitted by both sides.

[Portion not relevant to antitrust claim is omitted.]

In the second cause of action, the plaintiff urges that a no-switching agreement exists between the companies of the Bell System and that such agreement constitutes a conspiracy in constraint of trade. The main thrust of Mr. Taterka's second cause of action, as stated in the amended complaint is as follows:

> "23. The defendant is the dominant telephone company in the state of Wisconsin operating approximately seventy-two percent (72%) of the telephones in the state. Because of the defendant's dominant position, the plaintiff was effectively precluded from pursuing his occupation in the state of Wisconsin

and thereby suffered injury to his business and property within the meaning of Section 4 of the Clayton Act (Title 15, United States Code, Section 15).

"24. By adherence to the no-switching agreement, the defendant and named co-conspirators imposed restrictions on their freedom to hire personnel. As such, they put themselves into a situation of restraint upon their ability to carry on interstate commerce.

"25. As a further result of the defendant's adherence to the no-switching agreement, the defendant has had to train inexperienced personnel for the position of switchman rather than employing those already trained. This has resulted in increasing training costs being borne by the defendant and, consequently, higher prices to the telephone using public."

In the order of May 1, 1975, I noted that the complaint contained no factual allegations that competition was impaired or trade and commerce affected by the alleged no-switching agreement and that the allegations of a conspiracy were not supported by factual allegations. The amended complaint remains subject to the same deficiency in that plaintiff has still failed to set forth in his amended complaint any injury incurred by reason of anything forbidden in the anti-trust laws. There are no factual allegations tending to suggest that the defendant's conduct affected anyong except the defendant and its employees. The allegations of paragraph 25, recited above, are remote and conclusory. I am unable to find in the amended complaint a cause of action alleging impact upon competition or a conspiracy between competitors.

Cf. Nichols v. Spencer International Press, Inc., 371 F.2d 332 (7th Cir. 1967).

It is my conclusion that the amended complaint does not contain adequate factual allegations of anti-competitive effect or effect on the public interest. The plaintiff's allegations as to employment practices as distinguished from restraint of trade are not sufficient to withstand the defendant's motion to dismiss.

Therefore, IT IS ORDERED that the defendants motion to dismiss be and hereby is granted.

IT IS ALSO ORDERED that the plaintiff's action be and hereby is dismissed.

Dated at Milwaukee, Wisconsin, this 5 day of March, 1976.

/s/Myron L. Gordon
U.S. District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

- -

STEVEN A. TATERKA,
Plaintiff,
v. # 74-C-625
WISCONSIN TELEPHONE CO.,
Defendant.

- -

DECISION and ORDER

[Portion not relevant to antitrust claim is omitted.]

In his second cause of action, Mr. Taterka alleges that

> "an agreement exists between Bell System companies that they will not hire persons employed by other Bell System companies while still employed by such other Bell System companies or for a period of six months thereafter and that such [a "no-switch"] agreement constitutes a conspiracy in restraint of trade and is therefore illegal under Title 15, United States Code, Section 1 et seq."

This matter is before me on the defendant's motion to dismiss pursuant to Rules 12(b)(1) and (6), Federal Rules of Civil Procedure. Because "matters outside the pleading" have been "presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56." See Rule 12(b)(6).

[Portion not relevant to antitrust claim is omitted.]

In his second cause of action, the plaintiff challenges the legality under the antitrust laws of an alleged "no-switching" agreement which, according to paragraphs 30 and 31 of the complaint, exists between Bell System companies and provides as follows:

> "that Bell System companies will not hire persons employed by other Bell System Companies while still employed by such other Bell System companies or for a period of six (6) months thereafter."

The plaintiff asserts in paragraphs 28 and 29 of his complaint that, in reliance upon the existence of such a "no-switching" agreement, the defendant "refused to permit him to fill out employment application forms" during the month of July, 1971 (when he was still employed by New York Telephone Company). Assuming arguendo the existence of such an agreement, I conclude that no violation of the antitrust laws is set forth as a matter of law and that the second cause of action should also be dismissed. Rule 12(b)(6), Federal Rules of Civil Procedure.

15 U.S.C. § 17 states in pertinent part that "The labor of a human being is not a commodity or article of commerce." Furthermore, the complaint contains no factual allegations that competition is impaired, that any trade or commerce is affected, that any underlying anti-competitive agreement is implemented by the alleged "no-switching" agreement, or that a contract was made or a conspiracy existed between competitors. See Nichols v. Spencer International Press, Inc., 371 F.2d 332 (7th Cir. 1967); Miller v. Kimberly-Clark Corporation, 339 F.Supp. 1296 (E.D. Wis. 1971). The plaintiff concludes in paragraph 33 of the complaint that the alleged "no-switching" agreement alone

"constitutes a conspiracy in restraint of trade." However, this conclusion is not supported by the factual allegations or the law.

Significantly, the complaint reveals that the plaintiff resigned from New York Telephone Company in October, 1972 (para. 8d) and that in November, 1972 (Exhibit A), or on or about December 1, 1972 (para. 5), he submitted an application for employment to the defendant. The plaintiff nowhere alleges that the defendant's acceptance of this application was conditioned on a six-month waiting period, or that he was then told that he could not be hired for six months after his resignation from the New York company. As a matter of fact, he states in Exhibit A:

> "At the time I was told I would be contacted if anything became available."

Acceptance by the defendant of Mr. Taterka's application--under these circumstances alleged by the plaintiff himself--undercuts his allegation that the alleged "no-switching" agreement existed.

Therefore, it is ordered that the defendant's motion to dismiss be and hereby is granted.

It is also ordered that this complaint be and hereby is dismissed, without prejudice.

It is further ordered that this action be and hereby is dismissed unless, within 30 days from the date of this order, the plaintiff files an amended complaint.

Dated at Milwaukee, Wisconsin, this 1st day of May, 1975.

/s/Myron L. Gordon
U.S. District Judge

June 30, 1976

Mr. Steven A. Taterka
Post Office Box 971
Milwaukee, Wisconsin 53201

Douglas L. Reed
Attorney at Law
722 North Broadway
Milwaukee, Wisconsin 53202

Re: Taterka v. Wis. Telephone Co.
74-C-625

Gentlemen:

On June 29, 1976, Judge Gordon denied the plaintiff's motion to vacate judgment by writing the words:

> "Motion denied.
> Myron L. Gordon
> U.S. Dist. Judge
> June 29, 1976"

on the face thereof.

Very truly yours,

/s/
Dennis M. Grzezinski
Law Clerk to Judge Gordon

DMG:bp

Supreme Court, U. S.
FILED
OCT 11 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-384

STEVEN A. TATERKA, *Petitioner,*

v.

WISCONSIN TELEPHONE COMPANY, *Respondent.*

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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October 11, 1977

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-384

STEVEN A. TATERKA, *Petitioner*,

v.

WISCONSIN TELEPHONE COMPANY, *Respondent*.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondent, Wisconsin Telephone Company herein opposes the petition for a writ of certiorari filed by Steven A. Taterka on September 9, 1977.

QUESTIONS PRESENTED [1]

1. Whether an agreement between non-competing employers under which each of the parties agrees that it will not hire as new hires persons employed by the other parties while they are so employed or for six months thereafter violates Section 1 or Section 2 of the Sherman Act?

---

[1] Despite Petitioner's assertions to the contrary, no question of standing is involved since standing was not denied by the lower courts.

2. Whether the trial court abused its discretion in refusing to permit the filing of a second amended complaint, which, like the original complaint and first amended complaint, failed to allege a cause of action?

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in this case are those which appear at pp. 3-4 of the Petition.

STATEMENT OF THE CASE

This case is pleaded as an antitrust action in which the Plaintiff-Petitioner (hereinafter "Petitioner") Steven A. Taterka, after abandoning a cause of action pleaded under the Civil Rights Act of 1964, seeks to recover treble damages, pursuant to Section 4 of the Clayton Act, 15 U.S.C. § 15, allegedly caused by reason of violation by the Defendant-Respondent Wisconsin Telephone Company (hereinafter "Respondent") of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. Respondent is a Bell System operating telephone company and does not compete with any other Bell System companies in any trade or commerce. The violation asserted is the alleged participation by Respondent in an agreement with other Bell System companies, with which it does not compete, to refrain from hiring employees of those other Bell System companies while they are so employed or for six months thereafter. No agreement affecting the respective employees or business of non-Bell System companies is claimed to exist between Respondent and any of its competitors or between Respondent and any other party. Nothing in the agreement as alleged precludes

any employee from employment in the Bell System for any period of time whatsoever, since the employee, should he or she leave and want to return in less than six months, can, under its terms, be hired back by the original Bell System employer. Also, in his amended and proposed second amended complaints[2] (App. A, pp. 1a-9a; Pet. App., pp. 1a-8a), Petitioner admits that procedures are employed in the Bell System enabling employees to transfer from one Bell System company to another (Pet. App., pp. 3a-4a, para. 8).

Petitioner filed his original complaint in the United States District Court for the Eastern District of Wisconsin on December 24, 1974 alleging that the agreement described above, a "no-switching" agreement, in and of itself violated the Sherman Act. Considering matters outside the pleadings and treating Respendent's motion to dismiss as a motion for summary judgment, the District Court granted the motion. It ruled that Petitioner had alleged only a no-switching agreement and had failed to allege that competion was impaired, that any trade or commerce was affected, or that any underlying anti-competitive agreement was implemented by that agreement or that a contract was made or conspiracy existed between competitors (Pet. App., pp. 21a-23a).

[2] The Petitioner's first question presented to this Court apparently challenges the propriety of the dismissal of his first amended complaint although that complaint alleged, as a second cause of action, a violation of Section 1 of the Sherman Act only and not Section 2 of that Act. No copy of that complaint was included in Petitioner's brief. The Respondent has therefore submitted a copy for the Court's reference, which appears as Appendix A, pp. 1a-20a. The first cause of action in that amended complaint, relating to a charge of discrimination, has been abandoned.

Taking advantage of an opportunity afforded by the District Court, Petitioner filed his amended complaint claiming that the alleged agreement interfered with employee mobility, increased prices and restricted the freedom of the parties thereto to hire. Respondent again moved to dismiss and on March 5, 1976 the District Court granted the motion and dismissed the action, ruling that Petitioner complained of employment practices, not any restraint of trade (Pet. App., pp. 18a-20a).

Petitioner then moved to vacate the judgment of March 5, 1976 and for leave to file his second amended complaint. That proposed complaint was submitted with his motion and the motion was denied on June 29, 1976. Petitioner appealed from the order dismissing his first amended complaint and from the order denying his motion to vacate judgment and to file his second amended complaint. On May 4, 1977, the United States Court of Appeals for the Seventh Circuit affirmed the orders appealed from in a six page unpublished order (Pet. App., pp. 10a-16a).

On May 21, 1977, Petitioner submitted a petition for rehearing in *banc* to the Court of Appeals raising the same questions of conflict between the Court of Appeals for the Seventh Circuit and the decisions of the United States Supreme Court and the Court of Appeals for the Second Circuit as he raises on Page 8 of the Petition for Writ of Certiorari (App. B, pp. 21a-26a). On May 29, 1977 he wrote to the Honorable Thomas E. Fairchild, Chief Judge of the Court of Appeals for the Seventh Circuit, calling his attention to the pendency of the petition for rehearing and stressing a portion of the argument (App. C, p. 27a).

That petition was denied on June 14, 1977 (Pet. App., p. 17a).

On June 2, 1977, Petitioner submitted a motion to the Court of Appeals asking that the unpublished order of May 4, 1977 be published pursuant to Circuit Rule 35(c) of the Seventh Circuit[3] (App. D, pp. 29a-30a). The motion was denied on June 13, 1977.

---

[3] (c) Guidelines for Method of Disposition.

(1) Published opinions:

Shall be filed in signed or per curiam forum in appeals which

(i) Establish a new or change an existing rule of law;
(ii) Involve an issue of continuing public interest;
(iii) Criticize or question existing law;
(iv) Constitute a significant and non-duplicative contribution to legal literature
  (A) by a historical review of law;
  (B) by describing legislative history; or
  (C) by resolving or creating a conflict in the law; or
(v) Reverse a judgment or deny enforcement of an order when the lower court or agency has published an opinion supporting the order.

(2) Unpublished orders:

(i) May be filed after an oral statement of reasons has been given from the bench and may include only, or little more than, the judgment rendered in appeals which
  (A) are frivolous or
  (B) present no question sufficiently substantial to require explanation of the reasons for the action taken such as where
    (aa) a controlling statute or decision determines the appeal;
    (bb) issues are factual only and judgment appealed from is supported by evidence;
    (cc) order appealed from is nonappealable or this court lacks jurisdiction or appellant lacks standing to sue; or
(ii) May contain reasons for the judgment but ordinarily not a complete nor necessarily any statement of the facts, in appeals which
  (A) are not frivolous but

REASONS FOR OPPOSING THE WRIT

By issuing its decision as an unpublished order, and by denying Petitioner's petition for rehearing and motion for publication of order, the Court of Appeals has deliberately determined that this case does not involve an issue of continuing public interest: does not establish a new or change an existing rule of law; does not resolve or create a conflict in the law; and only presents arguments concerning the application of recognized rules of law. After a careful review of the record and those recognized rules (as its May 4, 1977 order reveals) the Court of Appeals determined that, far from involving important issues of a type which might warrant the attention of the United States Supreme Court, this case actually involves no issues the resolution of which is significant enough, under its Rule 35(c) to constitute a contribution to legal literature.

A review of the pleadings and opinions in this case confirms that there are no issues of any significance beyond the interests of the parties hereto. The District Court and Court of Appeals only dealt with allegations that an employee of one Bell System company who could have attempted, but did not attempt to transfer to another Bell System company was injured, because he could not, under an alleged agreement, apply for employment with that other company as a new hire. Respondent urges that this limited personal claim does not merit consideration by the United States Supreme Court for any special and important reasons.

(B) present arguments concerning the application of recognized rules of law, which are sufficiently substantial to warrant explanation but are not of general interest or importance.

I

THE PETITION SHOULD BE DENIED BECAUSE THE SEVENTH CIRCUIT COURT OF APPEALS DECISION IN THIS CASE DID NOT DECIDE A FEDERAL QUESTION IN A MANNER WHICH CONFLICTED WITH THE DECISIONS OF THE UNITED STATES SUPREME COURT IN *RADOVICH* V. *NATIONAL FOOTBALL LEAGUE*, 352 U.S. 445 (1957), AND *ANDERSON* V. *SHIPOWNERS' ASS'N OF PACIFIC COAST*, 272 U.S. 359 (1926).

That the United States Court of Appeals for the Seventh Circuit is fully aware of the rules of law proclaimed in the *Radovich* and *Anderson* cases and will apply those rules in a proper case is established not only by its ruling in this case, but also by its earlier decision in *Nichols* v. *Spencer International Press, Inc.*, 371 F.2d 332 (7th Cir. 1967). After considering the *Radovich* and *Anderson* decisions, the Circuit Court held in *Nichols* that a no-switching agreement between competing employers was actionable in a suit under the Sherman Act by an employee who alleged a substantive violation of the antitrust laws.

In this case, the Court of Appeals merely held that an alleged no-switching agreement between noncompeting employers is not actionable in a suit under the Sherman Act by an employee who fails to allege a reasonably foreseeable, nonspeculative effect of that agreement on any trade or commerce or on business competition. Nothing in that ruling contradicts or conflicts with the *Radovich* or *Anderson* cases. On the contrary, the ruling is the only reasonable interpretation of those cases, given the fact that the Sherman Act was enacted to protect trade and commerce and commercial competition. *Northern Pac. Ry. Co.* v. *United States*, 356 U.S. 1 (1958); *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469 (1940).

II

THE PETITION SHOULD BE DENIED BECAUSE NO CONFLICT EXISTS BETWEEN THE DECISION OF THE SEVENTH CIRCUIT COURT OF APPEALS IN THIS CASE AND THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT IN *UNION CIRCULATION* CO. V. *FTC.* 241 F.2d 652 (1957), AS THE QUESTIONS INVOLVED IN THE TWO CASES ARE DIFFERENT

As with *Radovich* and *Anderson,* the Court of Appeals has demonstrated its knowledge of and respect for the decision of the Second Circuit in the *Union Circulation* case, not only in its decision in this case, but in its prior decision in *Nichols.* Unlike this case, *Nichols* and *Union Circulation* both involved no-switching agreements between competitors. As the Court of Appeals noted in its May 4, 1977 order, in *Union Circulation* the possible effect of the challenged agreement on newly-formed nonparty competitors could reasonably be foreseen as harmful. In contrast, the possible effects of the alleged agreement challenged in this case are speculative, particularly when the minimal time impact of that agreement and the affected employees' freedom to return to their original Bell System employers are considered.

The *Union Circulation* ruling was not rejected by the Court of Appeals decision in this case, but was properly distinguished.

III

THE PETITION SHOULD BE DENIED BECAUSE THE REFUSAL BY THE DISTRICT COURT TO VACATE JUDGMENT AND PERMIT THE FILING OF A SECOND AMENDED COMPLAINT WAS NOT AN ABUSE OF DISCRETION

Neither *Foman* v. *Davis,* 371 U.S. 178 (1962), nor *Austin* v. *House of Vision, Inc.,* 385 F.2d 171 (7th Cir. 1967), both relied upon by Petitioner, warrants or supports the conclusion that Petitioner was entitled to file a second amended complaint. Further, no prejudice resulted to Petitioner by reason of the District Court's refusal to vacate judgment and permit that filing.

In *Foman, supra* 371 U.S. at 182, this Court specifically recognized the validity of several reasons for denying leave to amend a complaint. Two of these reasons present here—repeated failure to cure deficiencies by amendments previously allowed and the futility of the amendment, justify the denial of leave to amend in this case.

The May 4, 1977 Order of the Court of Appeals discussed the failure of Petitioner to cure defects in his original and amended complaints in the light of *Foman* and properly held that that failure warranted the denial of leave to file a second amendment. Additionally, the Court of Appeals, unlike the Court in *Austin,* had a full opportunity to, and did, test the proposed second amendment for futility and ruled that it, too, like the original and amended complaints, was deficient. In *Austin,* the Court was unable to apply that test, since the proposed amended complaint had not been submitted to the District Court

when leave to amend was sought.[4] Unlike the Court of Appeals order in this case, no discussion of the merits of the proposed amendment was contained in the 1967 *Austin* opinion.

In denying Petitioner's motion to vacate judgment to permit the filing of a second amended complaint, both the District Court and the Court of Appeals examined the allegations of his proposed amendment and found them wanting. Under those circumstances, the claimed procedural defect is of no import.

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[4] This fact is clearly revealed by the Court of Appeals statement (385 F.2d at 172):

> "Whether such an amended complaint will state a cause of action cannot be determined unless and until such an amended complaint is filed and tested."

and by its statement on a subsequent appeal, *Austin* v. *House of Vision, Inc.*, 404 F.2d 401 (7th Cir. 1968):

> "On remand, the district court granted such leave and plaintiff filed his second amended complaint. On consideration thereof, the trial court granted defendants' motion to dismiss and the second amended complaint was dismissed." (*id.* at 401-02.)

CONCLUSION

Petitioner was given adequate opportunity to attempt to plead a cause of action under the Sherman Act in the District Court. His failures in that respect under proper interpretations of existing law have been accurately enunciated by both the District Court and the Court of Appeals, and the deficiencies in his proposed further amended pleading in the light of existing law have been fully described by the Court of Appeals. That Court has determined and an analysis of the pleadings and of the law confirms that this case involves no issues of interest or importance to persons other than the parties.

We therefore ask that the Petition for Writ of Certiorari be denied for the reasons stated herein.

Respectfully submitted,

FRED D. HUBER, JR.
722 North Broadway
Milwaukee, Wisconsin 53202

Counsel for Respondent
Wisconsin Telephone Company

Of Counsel:

A. T. BREIT
JOAN DALTON
722 North Broadway
Milwaukee, Wisconsin 53202

October 11, 1977

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Civil Action No. 74 C 625

STEVEN A. TATERKA, *Plaintiff*,

v.

WISCONSIN TELEPHONE COMPANY, *Defendant*.

Amended Complaint

(FILED AUGUST 1, 1975)

The plaintiff, complaining of the defendant, alleges as follows:

FIRST CAUSE OF ACTION

1. This action is brought to annul and set aside a determination of the Equal Employment Opportunity Commission arising from a charge of discrimination brought by charging party, plaintiff in this action, against respondent, defendant in this action issued on September 26, 1974. A copy of said charge of discrimination, marked "Exhibit A", and a copy of said determination, marked "Exhibit B", are attached to this complaint. The jurisdiction of this Court is invoked under Title VII of the Civil Rights Act of 1964, as amended, 78 Stat. 253 (Title 42, United States Code, Section 2000e et seq.).

2. The defendant is a corporation organized under the laws of the state of Wisconsin with its principal offices located at 722 North Broadway, Milwaukee, Wisconsin. At all times mentioned herein the defendant operated within the state of Wisconsin within the territorial jurisdiction of this Court.

3. The defendant is an employer within the meaning of Title 42, United States Code, Section 2000e-(b) and is engaged in an industry affecting commerce within the meaning of Title 42, United States Code, Section 2000e-(h).

4. The plaintiff is an adult white male citizen of the United States and a resident of the state of Wisconsin. From November, 1970 to October, 1972, he was employed as a switchman with New York Telephone in what is known in the telephone trade as the number 5 crossbar switching system. While employed during that period the plaintiff successfully completed a three (3) month training course as required by New York Telephone. The plaintiff resigned from New York Telephone in October, 1972 and was in good standing with that company at that time. By virtue of his training and experience the plaintiff is duly qualified to perform the duties of a switchman in a number 5 crossbar switching system.

5. On December 1, 1972 the plaintiff, after having resigned his employment with New York Telephone, went to the employment office of the defendant for the purpose of obtaining employment as a switchman. He filled out an application for employment which was subject to a six (6) month waiting period as set forth in paragraph 18 of this complaint.

6. The position of switchman within the defendant company is predominantly staffed by white males. Under the defendant's hiring policies as specified in paragraph 8 of this complaint, the plaintiff has been, and is, ineligible for employment in the position of switchman solely on account of his race and sex in violation of Title VII of the Civil Rights Act of 1964, Section 703(a)(1), 78 Stat. 255 (Title 42, United States Code, Section 2000e-2(a)(1) and Section 703(j), 78 Stat. 257 (Title 42, United States Code, Section 2000e-2(j).

7. On January 18, 1973 the American Telephone and Telegraph Company, on behalf of itself and its associated Bell System telephone companies, and the Equal Employment Opportunity Commission (hereinafter EEOC) and the United States Department of Labor entered into a consent decree, civil action number 73-149 in the United States District Court for the Eastern District of Pennsylvania. Attached to the consent decree as appendices A, B and C respectively, and made a part thereof, were American Telephone and Telegraph Company's Model Affirmative Action Program, Upgrading and Transfer Plan and Job Briefs and Qualifications; such appendices are collectively referred to as the "Model Programs". The consent decree is to remain in effect until January 18, 1979.

8. The Consent Decree, together with the "Model Programs" specifies goals and timetable requirements based on race and sex that Bell System companies, including the defendant, must meet. In keeping with these requirements the defendant is attempting to achieve a proportionate representation of its work force, on the basis of race and sex, with that of the population of the surrounding area in which the defendant operates. The defendant is attempting to do this in each of the fifteen (15) Affirmative Action Program Job Classifications defined in American Telephone and Telegraph Company's Affirmative Action Program. Until the defendant achieves a proportionate representation of its work force in the job classification of switchman, on the basis of race and sex, with that of the population in the surrounding area, the plaintiff will continue to be ineligible for employment with the defendant as a switchman. To date, the plaintiff has not been offered employment of any kind with the defendant.

9. On April 8, 1974 the plaintiff filed a charge of discrimination with the EEOC. A copy of said charge of

discrimination, marked "Exhibit A" is attached to this complaint.

10. On September 26, 1974 the EEOC issued a determination dismissing plaintiff's charge of discrimination for 'no reasonable cause". A copy of said determination, marked "Exhibit B" is attached to this complaint.

11. On September 26, 1974 the EEOC issued a notice of right to sue to the plaintiff. A copy of said notice, marked "Exhibit C" is attached to this complaint.

12. By virtue of the unlawful acts of the defendant, the plaintiff has suffered damage in an amount equal to wages for the position of switchman from December 1, 1972 to the present.

SECOND CAUSE OF ACTION

13. This action arises under the Sherman Antitrust Act of July 2, 1890, c.647, 26 Stat. 209, as amended (Title 15, United States Code, Sections 1-7) and the Clayton Antitrust Act of October 15, 1914, c.323, 38 Stat. 730, as amended (Title 15, United States Code, Section 12 et seq.)

14. The defendant is a corporation organized under the laws of the state of Wisconsin with its principal offices located at 722 North Broadway, Milwaukee, Wisconsin. At all times mentioned herein the defendant operated within the state of Wisconsin within the territorial jurisdiction of this Court.

15. The defendant is, and at all times mentioned herein was, engaged in the business of providing communication services. As such, the defendant was engaged in interstate commerce.

16. The acts and conduct of the defendant and the defendant's co-conspirators hereafter referred to constitute a conspiracy in restraint of trade and commerce among the several states in violation of Section 1 of the Sherman Act (Title 15, United States Code, Section 1).

17. At all times mentioned herein the plaintiff's occupation was that of a switchman in what is known in the telephone trade as a number 5 crossbar switching system. The plaintiff was employed in that capacity with the New York Telephone Company during the period November, 1970 to October, 1972 at which time he resigned. While employed during that period, the plaintiff successfully completed a three (3) month training course as required by New York Telephone.

18. At all times mentioned herein the defendant, which is known as a Bell System company, and the co-conspirators named in paragraph 19 of this complaint, which are also known as Bell System companies, gave force and effect to an agreement imposing restrictions on employment (hereinafter referred to as the no switching agreement). Under the no switching agreement, Bell System companies would not hire persons employed by other Bell System companies while still employed by such other Bell System companies or for a period of six (6) months thereafter. While there did exist a procedure by which Bell System employees might transfer from one Bell System company to another, such procedure was subject to approval of both the Bell System company an employee wished to transfer to and the Bell System company he wished to transfer from. A refusal by a current Bell System employer to grant approval precluded the possibility of a transfer. An employee of a Bell System company who did not, or for any reason could not, avail himself of the transfer procedure was unable to secure employment with another Bell System company within six (6) months of resigning his Bell System employment due to adherence to the no switching agreement by the defendant and named co-conspirators. The no switching agreement was aimed at the plaintiff, and others similarly situated, and enabled the defendant and named co-conspirators, by virtue of their dominant position in the telephone field, to exercise great control over the mobility of their employees.

19. Various corporations, not named as defendants herein, participated as co-conspirators with the defendant in the conspiracy charged herein. These corporations, generally known as Bell System companies, include the following:

American Telephone and Telegraph Company

New England Telephone and Telegraph Company

The Southern New England Telephone Company

New York Telephone Company

New Jersey Bell Telephone Company

The Bell Telephone Company of Pennsylvania

The Diamond State Telephone Company

The Chesapeake and Potomac Telephone Company

The Chesapeake and Potomac Telephone Company of Maryland

The Chesapeake and Potomac Telephone Company of Virginia

The Chesapeake and Potomac Telephone Company of West Virginia

Southern Bell Telephone and Telegraph Company

South Central Bell Telephone Company

The Ohio Bell Telephone Company

Cincinnati Bell Inc.

Michigan Bell Telephone Company

Indiana Bell Telephone Company, Inc.

Illinois Bell Telephone Company

Northwestern Bell Telephone Company

Southwestern Bell Telephone Company

The Mountain States Telephone and Telegraph Company

Pacific Northwest Bell Telephone Company

The Pacific Telephone and Telegraph Company

Bell Telephone Company of Nevada.

20. During the month of July, 1971 the plaintiff, while still in the employ of New York Telephone, attempted to obtain employment with the defendant as a switchman. Plaintiff, unable to work at that time due to a strike then being waged against New York Telephone, presented himself at the employment office of the defendant whereupon, pursuant to the no switching agreement alleged in paragraph 18 of this complaint, defendant's employment representative refused to permit the plaintiff to fill out an application for employment.

21. On December 1, 1972 the plaintiff, after having resigned his employment with New York Telephone, again attempted to obtain employment with the defendant as a switchman. At that time, the plaintiff was permitted to fill out an application for employment; however, such application was subject to the six (6) month waiting period required by the no switching agreement.

22. As a direct result of the defendant's adherence to the no switching agreement, the plaintiff was precluded from employment with the defendant:

(a) during the time he was still employed with New York Telephone;

(b) for the six (6) month period beginning October, 1972 when he resigned from New York Telephone and;

(c) suffered loss of employment which would have continued from the time periods stated in (a) and

(b) had the plaintiff not been barred during those periods.

The plaintiff has therefore suffered loss of wages for the position of switchman with defendant from July, 1971 to the present.

23. The defendant is the dominant telephone company in the state of Wisconsin operating approximately seventy-two percent (72%) of the telephones in the state. Because of the defendant's dominant position, the plaintiff was effectively precluded from pursuing his occupation in the state of Wisconsin and thereby suffered injury to his business and property within the meaning of Section 4 of the Clayton Act (Title 15, United States Code, Section 15).

24. By adherence to the no switching agreement, the defendant and named co-conspirators imposed restrictions on their freedom to hire personnel. As such, they put themselves into a situation of restraint upon their ability to carry on interstate commerce.

25. As a further result of the defendant's adherence to the no switching agreement, the defendant has had to train inexperienced personnel for the position of switchman rather than employing those already trained. This has resulted in increasing training costs being borne by the defendant and, consequently, higher prices to the telephone using public.

Wherefore, plaintiff prays:

FIRST CAUSE OF ACTION

That the defendant be enjoined from further implementation of the Consent Decree specified in paragraph 7 of this complaint.

That the amount of damages plaintiff has sustained by reason of the unlawful acts of the defendant be ascertained

and assessed according to defendant company's wage scales for the position of switchman from December 1, 1972 to the present and defendant company be ordered to pay to the plaintiff such amount.

That the plaintiff recover such other amounts and have such other and further relief as the Court shall deem just.

SECOND CAUSE OF ACTION

That the herein alleged no switching agreement between the defendant and named co-conspirators be adjudged and decreed to be an unreasonable restraint of interstate trade and commerce in violation of Section 1 of the Sherman Act (Title 15, United States Code, Section 1).

That the amount of damages plaintiff has sustained by reason of the unlawful acts of the defendant be ascertained and assessed according to defendant company's wage scales for the position of switchman from July, 1971 to the present and the defendant be ordered to pay to the plaintiff three (3) times the amount of such damages as provided by Section 4 of the Clayton Act (Title 15, United States Code, Section 15).

That the plaintiff recover such other amounts and have such other and further relief as the Court shall deem just.

/s/ STEVEN A. TATERKA
Steven A. Taterka
Plaintiff pro se
8340 North Regent Road
Milwaukee, Wisconsin
414 352-6021

Exhibit A

(Please Print or Type)

CHARGE OF DISCRIMINATION

EEOC Charge No.—TMK 4-1055

Form Approved OMB No.—124-R0001

Instructions

If you have a complaint, fill in this form and mail it to the Equal Employment Opportunity Commission's District Office in your area. In most cases, a charge must be filed with the EEOC within a specified time after the discriminatory act took place. It is therefore important to file your charge as soon as possible. *(Attach extra sheets of paper if necessary.)*

Cause of Discrimination

☒ Race or Color ☒ Sex
☐ Religious Creed
☐ National Origin

Name *(Indicate Mr. or Ms.)*—Mr. Steven A. Taterka

Street Address—200 West 80th St., Apt. 9M

County—New York

City, State, and Zip Code—New York, New York 10024

Date of Birth—July 17, 1948

Social Security No.—076-38-6714

Telephone No. *(Include area code)*—212 874-2932/799-7819

The Following Person Always Knows Where To Contact Me

Name *(Indicate Mr. or Ms.)*—Mr. Luis R. Hernandez

Street Address—9745 West Beatrice St., Apt. 4

City, State, and Zip Code—Milwaukee, Wi. 53224

Telephone No. *(Include area code)*—414 355-5693

List the Employer, Labor Organization, Employment Agency, Apprenticeship Committee, State or Local Government Who Discriminated Against You
(If more than one, list all)

Name—Wisconsin Telephone Company

Telephone No. (Include area code)—414 393-9300

Street Address—722 North Broadway

City, State, and Zip Code—Milwaukee, Wi. 53203

Others Who Discriminated Against You—[blank]

Charge Filed with State/Local Gov't. Agency—
☐ Yes ☒ No

Date Filed—[blank]

Agency Charge Filed with *(Name and address)*—[blank]

Approximate No. of Employees/Members of Company or Union This Charge Is Filed Against—[blank]

DATE MOST RECENT OR CONTINUING DISCRIMINATION TOOK PLACE *(Month, day, and year)*—April, 1974

Explain what unfair thing was done to you and how other persons were treated differently. Understanding that this statement is for the use of the United States Equal Employment Opportunity Commission, I hereby certify:

Please see attached sheets.

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

DATE—4/8/74

CHARGING PARTY *(Signature)*—Steven A. Taterka

Subscribed and sworn to before this EEOC representative.
DATE—[blank] SIGNATURE AND TITLE—[blank]

NOTARY PUBLIC

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE

(Day, month, and year)—8th April 1974

SIGNATURE *(If it is difficult for you to get a Notary Public to sign this, sign your own name and mail to the District Office. The Commission will notarize the charge for you at a later date.)*

/s/ Joan D. Beaumont

From November, 1970 to October, 1972 I was employed as a switchman with the New York Telephone Company. This position, also known as central office repairman, involves the maintenance and repair of telephone company central office switching equipment. The type of system I have experience with is known in the trade as the Number 5 Crossbar switching system.

Of the total time I was employed by New York Telephone, three months were spent in a Bell System training course to learn the operation of the system involved; this included two months of classroom instruction and one month of field training.

During October, 1972 I voluntarily resigned my position with New York Telephone. Having lived in Milwaukee previously, my intention was to return and seek similar employment with the Wisconsin Telephone Company.

Prior to resigning, however, I had gone to the Wisconsin Telephone Company employment office (845 North 35 Street, Milwaukee) to inquire about working for the company; this was in July, 1971 during a prolonged strike against New York Telephone. I was told that if my work record from New York Telephone was satisfactory I would probably be hired when a vacancy existed for one with my (Number 5 Crossbar) experience. However, I was not permitted to file an application for employment at that time because Bell System companies did not accept applications from individuals currently employed by other Bell System companies; at the time I was still employed by New York Telephone, a Bell company. In addition, I was told that Wisconsin Telephone would not hire me for a period of six months following my resignation from New York Telephone because of an agreement that then existed between Bell System companies pertaining to Bell employees who did not transfer through regular company channels. A transfer would have been extremely difficult

at the time due to the strike then being waged against New York Telephone.

In November, 1972, shortly after resigning from New York Telephone, I filled out an application for employment with Wisconsin Telephone. At the time I was told I would be contacted if anything became available. Since that time I have inquired at Wisconsin Telephone's employment office several times about the status of my application and, to date, have not been offered employment of any kind with the company.

I have been told by the company that my not being hired is a result of the agreement worked out in January, 1973 between the Equal Employment Opportunity Commission and the American Telephone and Telegraph Company on behalf of all Bell System companies. According to Wisconsin Telephone, the agreement requires that the company increase minority and female representation in the company work force to ratios reflecting minority and female representation in the general population of the Milwaukee area; the company says this must be accomplished in each job classification. Therefore, because minority and female representation is insufficient in the job classification for which I am applying (switchman), and because I do not fall into one of these two underrepresented groups, I am currently ineligible for this position.

While the company has not specifically stated it is filling each job classification on the basis of a quota system, this apparently is the case. Further, I was told that the company makes an annual report to the Milwaukee district office of the Equal Employment Opportunity Commission specifying progress made in increasing minority and female representation within each job classification.

Wisconsin Telephone has indicated that my work record from New York Telephone does not contain anything which would prevent employing me. To the contrary, I was told

by the company that my work record is in order. To the best of my knowledge, Wisconsin Telephone is not questioning my ability to work as a switchman.

While I was employed by New York Telephone I was told by Wisconsin Telephone that I could not be employed then, or for a period of six months thereafter, because I was at the time employed by a Bell System company. Now, having resigned from New York Telephone, I am told that preference must first be given to Bell System employees and I no longer work for Bell.

Having resigned from New York Telephone on the basis of what I was told by Wisconsin Telephone in July, 1971, I am now confronted with a completely different employment situation. This imposes a hardship on me in that time spent learning Bell System circuits is wasted because the skill involved is not marketable anywhere other than at a telephone company.

Exhibit B

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
342 North Water Street
Milwaukee, Wisconsin 53202
Telephone: 224-1111

September 26, 1974

In Reply Refer To:

Case No: YMK5-029
Charge No: TMK4-1055

Mr. Steven A. Taterka
200 West 86th Street
Apartment Number 9-M
New York, New York 10024

Charging Party

vs.

Wisconsin Telephone Company
722 North Broadway
Milwaukee, Wisconsin 53202

Respondent

Determination

It is undisputed that the Respondent Employer and the Commission entered into a Consent Decree, dated January 18, 1973 Civil Action Number 73-149, encompassing the issues contained in Charging Party's charges and that pursuant to the decree members of the aggrieved classes were to be identified and awarded appropriate relief. The aggrieved classes were determined to include only certain females and minority group employees of Respondent. Those persons found to have been aggrieved are now receiving their respective remedial relief pursuant to the Bell System upgrade and transfer plan, effective June, 1973,

Charging Party, a White male, alleges that he is being denied said relief because of his race and/or sex.

In a recent case involving a Consent Decree entered into between the Department of Justice and Libby, Owens, Ford Company, The Court, in considering the "loss" to males stated as follows:

> "However, certain fundamentals must be understood. A system which discriminates against some individuals necessarily discriminates in favor of others. The only way that the discrimination against some can be eliminated is to eliminate also that which is in favor of the others. This does not mean that the tables are turned so that the former underdog is now top dog, and vice versa, but only that in the future there will be neither. Necessarily, however, the one who was formerly in a favored position will no longer be so favored, and thus may well suffer some loss. The loss, however, is only of that privilege or benefit to which the loser was not justly entitled." *U.S.* v. *Libby Owens-Ford, Inc.* 3 EPD 8122 (D.C. Ohio 1971).

We believe the same rationale applies here and conclude that there is no reasonable cause to believe that Charging Party and other similarly situated White males have been discriminated against because of their race and/or sex as alleged.

Date: September 26, 1974.

On behalf of the Commission:

/s/ WESLEY N. HARRY
Wesley N. Harry
District Director

Exhibit C

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE

To: Mr. Steven A. Taterka
200 West 86th Street
Apartment Number 9-M
New York, New York 10024

FROM: Milwaukee District Office
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
342 North Water Street—6th Floor
Milwaukee, Wisconsin 53202

THIS CHARGE HAS BEEN DISMISSED FOR THE FOLLOWING REASON:

- ☒ No Reasonable Cause
- ☐ No Jurisdiction
- ☐ Untimely Charge
- ☐ Failure to Proceed

EEOC REPRESENTATIVE—Nelson G. Alston, District Counsel

TELEPHONE NUMBER—414/224-1111

CASE/CHARGE NUMBER—YMK5-029/TMK4-1055

If you want to pursue your charge further, you have the right to sue the respondent(s) named in this case in the United States District Court for the area where you live. If you decide to sue, you must do so within ninety (90) days from the receipt of this Notice; otherwise your right is lost.

If you do not have a lawyer or are unable to obtain the services of a lawyer, take this Notice to the United States District Court which may, in its discretion, appoint a lawyer to represent you.

An information copy of this Notice has been sent to the respondent(s) named in this case.

If you have any questions about your legal rights or need help in filing your case in court, call the EEOC representative named above.

/s/ WESLEY N. HARRY
Wesley N. Harry
District Director

cc: Wisconsin Telephone Company
Milwaukee, Wisconsin 53202

(Charging Party's Copy)

(EEOC Form 161—Apr 73)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Civil Action No. 74-C-625

STEVEN A. TATERKA, *Plaintiff*,

v.

WISCONSIN TELEPHONE COMPANY, *Defendant*

CERTIFICATE OF SERVICE

I, Steven A. Taterka, plaintiff in the above entitled action, certify that on July 31, 1975 I served the attached amended complaint upon counsel for the defendant by mailing a copy, postage prepaid, to Mr. Douglas Reed, Wisconsin Telephone Company, Room 1608, 722 North Broadway, Milwaukee, Wisconsin 53202.

/s/ STEVEN A. TATERKA
Steven A. Taterka
Plaintiff pro se
8340 North Regent Road
Milwaukee, Wisconsin 53217
414 352-6021

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 76-1888

STEVEN A. TATERKA, *Plaintiff-Appellant*,

v.

WISCONSIN TELEPHONE COMPANY, *Defendant-Appellee.*

APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN GRANTING DEFENDANT'S MOTION TO DISMISS IN CIVIL ACTION NO. 74-C-625

Petition for Rehearing In Banc

STEVEN A. TATERKA
Plaintiff pro se

P.O. Address:
200 West 86th St. # 9M
New York, N.Y. 10024

PETITION FOR REHEARING

Plaintiff-appellant, Steven A. Taterka, pursuant to Rule 40, Federal Rules of Appellate Procedure, respectfully petitions the Court for a rehearing in this cause for the reason that in affirming the judgment of the District Court, this Court has overlooked certain points of law as hereinafter set forth.

Suggestion of Rehearing In Banc
(per Circuit Rule 16(b))

Plaintiff-appellant, pursuant to Rule 35, Federal Rules of Appellate Procedure, suggests a rehearing in banc because:

a) The employment practice challenged in this action is engaged in by the Bell System, one of the nation's largest employers; and

b) The panel order is in conflict with the following decisions:

Radovich v. *National Football League,* 352 U.S. 445 (1957)

Union Circulation Co. v. *FTC,* 241 F.2d 652 (2 Cir. 1957)

Nichols v. *Spencer International Press, Inc.,* 371 F.2d 332 (7 Cir. 1967)

Statement of the Case

Plaintiff-appellant incorporates, by reference, the statement of the case set forth in plaintiff-appellant's principal brief at pages 2-6.

Issues Presented

Plaintiff-appellant incorporates, by reference, the statement of the issues presented in plaintiff-appellant's principal brief at page 1.

Argument

I

The Court Does Not Consider The Extent To Which The No-Switching Agreement Constitutes A Restraint Upon The Ability Of Bell System Operating Companies To Engage In Interstate Commerce

The Court concludes that because the parties to the no-switching agreement are not business competitors of one another in the usual sense, the agreement does not restrain business competition. In doing so the Court overlooks the extent to which American Telephone & Telegraph Company, the parent company of the Bell System, imposes adherence to the no-switching agreement upon the individual operating companies and thus restrains their freedom to engage in interstate commerce.

Competition for employees, insofar as it effects a business' ability to function, is no different than competition for anything else necessary to turn out a product or service; this has been demonstrated in cases in which employment contract provisions imposing unreasonable restrictions on an employee's right to work for another employer have been found violative of the Sherman Act. Thus the effect of the no-switching agreement upon the business of supplying telephone service is analogous to the restraint upon supplying reference books which this Court found actionable in *Nichols.* This is entirely consistent with the Supreme Court's decision in *Anderson* v. *Shipowners' Ass'n of Pacific Coast,* 272 U.S. 359 (1926) where the court found that shipowners who had agreed to a limitation on their right to hire employees had "put themselves into a situation of restraint upon their freedom to carry on interstate and foreign commerce" in violation of the Sherman Act. *Id* at 365. Bell System companies should not be immune from what is otherwise an illegal practice simply because they have government granted monopolies to operate in specified geographical areas.

II

THE COURT HAS MADE A DETERMINATION AS TO THE FACTUAL VALIDITY OF PLAINTIFF'S ANTI-COMPETITIVE ALLEGATIONS AND THUS EXCEEDED THE SCOPE OF REVIEW IN DETERMINING WHETHER A COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM.

In dealing with plaintiff's allegations that non-Bell operating companies and competing interconnect companies are placed at a competitive disadvantage because of the no-switching agreement, the Court concludes that such allegations are too speculative to support an antitrust action. The Court reaches this result stating that a Bell System employee contemplating going to a non-Bell company "does not appear" to face a substantial risk of being out of work within six months and precluded from further Bell System employment. This conclusion, itself speculative, is a factual determination that does not take into account the extent to which a Bell System employee perceives the risk since that is enough to prevent him from seeking employment with a non-Bell company. The Court has thus engaged in fact finding with respect to plaintiff's allegations of anticompetitiveness when the question is only whether or not the complaint states a cause of action.

In *Nichols* this Court held that the effects of the no-switching agreement were *not, as a matter of law,* so negligible that the agreement was not in restraint of trade. 371 F.2d at 337. Accordingly, the case was remanded for a determination as to whether the agreement was, in fact, in restraint of trade. In the instant case the Court, by concluding that the anticompetitive effects on non-Bell operating companies and competing interconnect companies alleged are speculative, has made the very determination that it directed the district court in *Nichols* to make on remand.

Addressing similar allegations as to the effects of a no-switching agreement upon those not party to it, the Second Circuit in *Union Circulation* entertained the idea that the effects of the agreements are such that they might constitute *per se* violations of the Sherman Act. See 241 F.2d at 656, n. 1. For that circuit to consider applicability of the *per se* doctrine to the no-switching practice and this Court to hold that the same practice, as a matter of law, does not violate the Sherman Act indicates a conflict between the two. This, along with the Court's prior decision in *Nichols,* lead to the conclusion that the case at bar should be remanded to the District Court for a determination as to the effects of the no-switching agreement upon non-Bell operating companies and competing interconnect companies.

III

THE COURT'S ANALYSIS OF THE BLACKLISTING AGREEMENT IN *Radovich* ITSELF SUPPORTS A FINDING THAT THE SECOND AMENDED COMPLAINT STATES A CLAIM

The Court analyzes *Radovich* observing that the blacklist there was part of a conspiracy to boycott players of a competing football league and therefore was anticompetitive. The Court then concludes that since no third-party competitors of Bell System companies are alleged to have been affected by the agreement in the amended complaint, the reasoning of *Radovich* is inapplicable here.

Under the Court's own interpretation of *Radovich,* the *second amended* complaint states a cause of action. In *Radovich* the blacklist was enforced against a player who had played for an NFL team, the NFL being a party to the agreement, and then played for a team which was part of a competing league. In the instant case the blacklisting extends to any Bell System employee who subsequently works for a non-Bell operating company or a

competing non-Bell interconnect company. Although the blacklisting is enforced against former Bell System employees whether or not they work for such non-Bell operating or interconnect companies, it clearly encompasses those who work for non-Bell companies. As the second amended complaint alleges damage to such non-Bell companies, under the Court's own reasoning it states a cause of action.

Conclusion

Based on the foregoing, plaintiff-appellant requests that this Petition For Rehearing In Banc be granted.

Respectfully submitted,

/s/ Steven A. Taterka
Steven A. Taterka

200 West 86th St. #9M
New York, N.Y. 10024
212 799-7819

APPENDIX C

Steven A. Taterka
P.O. Box 971
Milwaukee, Wi. 53201
May 29, 1977

Hon. Thomas E. Fairchild
United States Court of Appeals
for the Seventh Circuit
219 S. Dearborn St.
Chicago, Ill. 60604

Re: *Taterka* v. *Wisconsin Telephone Co., Case* #76-1888

Dear Judge Fairchild:

I am writing to bring to your attention a petition for rehearing recently filed in connection with the above case. I am doing so because I believe the Court's order conflicts with its decision in *Nichols* v. *Spencer International Press, Inc.*, 371 F.2d 332, 2 ALR Fed 829 (7 Cir. 1967).

The suit challenges the legality, under the Sherman Act, of a "no-switching" agreement adhered to by Bell System telephone companies. Under the agreement Bell companies do not hire each other's employees for a period of six months following previous Bell System employment. In *Nichols* you wrote that the effects of adherence to a similar no-switching agreement were sufficient, as a matter of law, to constitute a restraint of trade. Since the panel's unpublished order in the case at bar holds, as a matter of law, to the contrary, it cannot be reconciled with *Nichols*. All parties are apparently in agreement that *Nichols* is the

controlling decision in this Circuit and as you authored that decision, I believe you are the most qualified to interpret it.

Thank you for your attention to this matter.

Respectfully,

/s/ Steven A. Taterka
Steven A. Taterka

encl.
cc: Wisconsin Telephone Co.

(June 1, 1977)

APPENDIX D

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Cause #76-1888

Steven A. Taterka, *Plaintiff-Appellant,*

v.

Wisconsin Telephone Company, *Defendant-Appellee.*

Motion for Publication of Order

Plaintiff-appellant, Steven A. Taterka, moves the Court pursuant to Circuit Rule 35(d)(3) for an order directing that its unpublished order of May 4, 1977, in the above-entitled action, be issued as a published opinion.

This motion is made on the following grounds:

Per Circuit Rule 35(c)(1)(ii), this case involves an issue of continuing public interest as evidenced by publication of the District Court's original order in:

394 F.Supp. 862
10 FEP Cases 966
1975-2 Trade Cases para. 60,462
10 EPD para. 10,338

and reference to that order in:

2 ALR Fed 839 (Supp. 1976).

Per Circuit Rule 35(c)(1)(ii), this case involves an issue of continuing public interest since the employment practice challenged in this action is engaged in by the Bell System, one of the nation's largest employers.

Per Circuit Rule 35(c)(1)(i), plaintiff-appellant believes the Court's order of May 4, 1977, changes an existing rule

of law as set forth in the Court's prior decision in *Nichols* v. *Spencer International Press, Inc.*, 371 F.2d 332, 2 ALR Fed 829 (7 Cir. 1967).

Per Circuit Rule 35(c)(1)(iv)(C), plaintiff-appellant believes the Court's order of May 4, 1977, creates a conflict with the Second Circuit decision in *Union Circulation Co.* v. *FTC*, 241 F.2d 652 (2 Cir. 1957).

Dated: June 2, 1977.

/s/ STEVEN A. TATERKA
Plaintiff-appellant

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